IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 3, 2003 Session

# DOUGLAS C. BOONE v. BRIAN MORRIS, ET AL.

**Appeal from the Circuit Court for Davidson County**
**No. 99C-3511 Walter C. Kurtz, Judge**

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**No. M2002-03065-COA-R3-CV - Filed October 6, 2004**

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After plaintiff took a voluntary nonsuit, he re-filed his personal injury action within one year of the dismissal relying on the saving statute. The trial court granted the defendants' respective motions for summary judgment and dismissal, finding the second suit time-barred because plaintiff had not complied with Tenn. R. Civ. P. 41.01. We conclude that "service" under Tenn. R. 41.01 means service under Tenn. R. Civ. P. 5, not service of process under Tenn. R. Civ. P. 4. We also hold that the defendants moving for summary judgment did not allege or present evidence that they did not receive the order of voluntary dismissal and dismissed complaint from the first suit. Consequently, we reverse the grant of summary judgment. We also conclude that the extension of the statute of limitations set out in Tenn. Code Ann. § 20-1-119(a) and (b) is not available to a plaintiff in a lawsuit recommenced, pursuant to the saving statute, after a nonsuit. Therefore, we affirm the grant of the motion to dismiss the defendant who was added after the original defendants named him as a party responsible for some or all of the injuries complained of.

**Tenn R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court**
**Affirmed in Part, Reversed in Part and Remanded**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

Sam Wallace, Springfield, Tennessee; Gary Rubenstein, Nashville, Tennessee, for the appellant, Douglas C. Boone.

John D. Richardson and Teresa A. Boyd, Memphis, Tennessee, for the appellees, Brian Morris, and Madison Security Services.

Alan Sowell, Nashville, Tennessee, for the appellee Major Grubbs.

## OPINION

This action arose out of an automobile accident which occurred on April 26, 1998. Douglas C. Boone ("Plaintiff") initially filed suit on February 19, 1999, naming Brian F. Morris and his employer, Madison Security Services[1] ("Madison"), as defendants. Service of process of the summons and complaint was not made on the defendants. Plaintiff nonsuited his complaint, and an order of voluntary dismissal was entered September 30, 1999.

On December 16, 1999, Plaintiff filed a second lawsuit against defendants Morris and Madison, and the defendants answered including a statement they relied on the one year statute of limitations as a bar to the claim.[2] Nothing in the record indicates that defendants pursued their statute of limitations argument. To the contrary, the parties engaged in discovery, and the case was referred to mediation on May 3, 2001, by an order requiring that trial be set if no settlement was reached. By agreed order dated August 7, 2001, the case was set for trial the next January. On November 26, 2001, defendants filed an Offer of Judgment in the amount of $42,500 and costs.

In December of 2001, the defendants moved to amend their answer to allege that a third party, Major Grubbs, the driver of another vehicle, caused or contributed to the accident and injury. Although Plaintiff initially opposed this amendment, a consent order was eventually entered allowing the defendants to amend their answer and allowing the plaintiff to file an amended complaint to add Major Grubbs as a defendant.

It was Mr. Grubbs's entry into the lawsuit and the arguments he made that apparently propelled Morris and Madison to assert their statute of limitations defense. On August 13, 2002, defendant Grubbs moved to dismiss on the ground that he had not been sued or served with process during the applicable statute of limitations. Additionally, however, he asserted that Tenn. Code Ann. § 20-1-119 did not apply to extend the statute of limitations because the original defendants, Morris and Madison, had not been named in either a complaint or original complaint filed within one year of the accident.

Defendants Morris and Madison Security then filed a motion for summary judgment also alleging the statute of limitations had expired. The sole basis for this motion was that the accident

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[1]In its pleadings, Madison pointed out that it had been incorrectly named in the lawsuit as Madison Security Services and that its correct name was Madison Armored Car, L.L.C. We will refer to the company as "Madison."

[2]In the answer, the defendants admitted that a motor vehicle accident had occurred between the two vehicles and admitted that Brian Morris was acting in the scope of his employment with Madison Armored Car, L.L.C. at the time of the accident.

had occurred on April 26, 1998, and the complaint was not filed until December 16, 1999, well beyond the one-year statute of limitations.[3] There was no mention of the prior nonsuited action.

Counsel for all the defendants apparently learned of the prior lawsuit and its dismissal after the motions were filed. Mr. Grubbs's amended motion to dismiss stated, "Plaintiff's counsel has advised the undersigned that this matter was previously filed and nonsuited." The amended motion set forth the relevant information about the previous action and its nonsuit, including the fact that although a summons was issued it was never served. Mr.Grubbs argued that even though it appeared that defendants Morris and Madison had been named in an original complaint filed within the statute of limitations, the action against him should nonetheless be dismissed because the requirements of Tenn. Code Ann. § 20-1-119 were not met.

Plaintiff then filed a response asserting that the statute of limitations had been tolled by the prior case and its nonsuit. Defendants Morris and Madison replied, and the reply acknowledged the prior complaint and its dismissal. However, they argued that the complaint must still be dismissed because plaintiff had not served them with copies of the notice of dismissal and the original complaint at the time of the nonsuit. "Plaintiff never served the Defendants until a point in time after the filing of the second complaint."

After initial argument on the motions, Plaintiff, through new counsel, provided the affidavit of his prior attorney to the effect that he had sent the original defendants a copy of the notice of voluntary dismissal, the order, and the original complaint through the mail.[4] The order of voluntary dismissal included a certificate of service that stated:

> I hereby certify that a copy of the foregoing Order of Voluntary Dismissal has been mailed to the Defendants, c/o Madison Security Services, at the new address of __Allied Drive Nashville, TN 37211 on this the 24th day of September, 1999.
>
> /s/
> Sam E. Wallace, Jr., Attorney
> Counsel for Plaintiff

Thus, Plaintiff argued, he had complied with Tenn. R. Civ. P. 41.01 and was entitled to the benefit of the saving statute. Defendants Morris and Madison responded, and included in the facts relevant to their summary judgment motion the following:

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[3]Both the Memorandum of Law in Support of the Motion for Summary Judgment and the Statement of Undisputed Facts cite as the only relevant facts the date of the accident and the date of the filing of the complaint. Both facts were apparent from the complaint.

[4]The affidavit, dated October 25, 2002, also stated that "The current case has been pending since December of 1999 and this issue has not been raised until now." The record supports that statement.

> Plaintiff never served the Defendants , Brian Morris and Madison Security Services, with the order of Non-Suit or with a copy of the First Complaint.
>
> Plaintiff mailed a copy of the Order of Non-Suit and First Complaint to "the address where I thought the defendants were doing business at the time." (*See* Affidavit of Sam Wallace).

The defendants argued that Plaintiff's service pursuant to Tenn. R. Civ. P. 5.02 did not comply with Rule 41.01 because that rule required service under Tenn. R. Civ. P. 4. They repeated their position that they had not been served until after the filing of the second complaint, obviously a reference to service of process. The plaintiff then responded with another affidavit from Mr. Wallace stating:

> On September 27, 1999 my office mailed to Brian Morris, individually, in care of the business he was employed by at the time of the accident in this case and to the business itself, as the service required by Rule 41.01 TRCP in regard to the nonsuit taken in case no. 99C-411. The envelope addressed to defendant Brian Morris came back to my office, and the phrases "no longer works here"'and "return to sender" had been written on the envelope, presumably by an employee of the defendant employer. It had also been stamped return to sender by the U.S. Postal Service. Thus, it is shown that **the defendant employer received actual service**. To the best of my knowledge information and belief the copies were forwarded on to another address for defendant Morris and were not returned. The file does not reflect any cover letters, nor any return correspondence. (emphasis added).

The original envelope was attached and had the handwritten notations on it as described in the affidavit. Apparently, the envelope addressed to Madison was not returned.

The trial court found that the saving statute was not triggered because plaintiff had failed to serve the defendants with the notice of nonsuit, the order of nonsuit and a copy of the original complaint, as required by Tenn. R. Civ. P. 41.01. On appeal, plaintiff takes issue with the trial court's dismissal of his second complaint against defendants Morris and Madison, insisting that the statute of limitations had been tolled by the saving statute and that his second lawsuit was timely.

The issues raised in this appeal are primarily issues of law. Our review of a trial court's determinations on issues of law is *de novo,* with no presumption of correctness. *Frye v. Blue Ridge Neuroscience Center, P.C.*, 70 S.W.3d 710, 713 (Tenn. 2002); *Bowden v. Ward,* 27 S.W.3d 913, 916 (Tenn.2000). Similarly, our review of a trial court's grant of summary judgment is also *de novo*. *Scott v. Ashland Healthcare Ctr., Inc.,* 49 S.W.3d 281, 284 (Tenn. 2001); *Staples v. CBL & Associates, Inc*., 15 S.W.3d 83, 89 (Tenn. 2000).

## I. NONSUIT AND THE SAVING STATUTE

There is no dispute that the relevant statute of limitations is Tenn. Code Ann. § 28-3-104 (a)(1), which requires that personal injury actions be commenced within one (1) year after the cause of action accrued. Here, the cause of action accrued on April 26, 1998, the date of the accident. Plaintiff filed his original complaint within the one year on February 19, 1999. Prior to service of process on the defendants, plaintiff moved to nonsuit his lawsuit on September 24, 1999, and the trial court entered an Order of Voluntary Dismissal on September 30, 1999. On December 16, 1999, twenty months after the accident, plaintiff filed his second complaint against defendants Morris and Madison.

Plaintiff insists that his second lawsuit is not time-barred by the one-year statute of limitations due to the Tennessee saving statute codified in Tenn. Code Ann. § 28-1-105(a) which provides that a plaintiff whose original action is commenced within the applicable statute of limitation, but is dismissed upon any ground not concluding the plaintiff's right of action, may "commence a new action within one (1) year after reversal or arrest."

It is undisputed that the original lawsuit was timely filed within the one (1) year statute of limitations period. Plaintiff argues that under the saving statute, he had one year from the date of the order of nonsuit in which to file the second complaint and that he did so when he filed the second complaint on December 16, 1999, only three months after the nonsuit. The question is not whether Plaintiff re-filed within the time set out in the saving statute. Rather, it is whether Plaintiff complied with the requirements of notifying unserved defendants of the original action and nonsuit and, thereby, is able to use the saving statute to avoid dismissal.

Where service of process of the summons and complaint in the first lawsuit is not had on the defendants, a plaintiff who files a second lawsuit in compliance with the saving statute may avoid dismissal of the second complaint on statute of limitations grounds if he or she has complied with the procedural requirements of Tenn. R. Civ. P. 41.01. *Frye*, 70 S.W.3d at 714-15. Rule 41.01 provides in part:

> . . . the plaintiff shall have the right to take a voluntary nonsuit to dismiss an action without prejudice by **filing a written notice of dismissal** at any time before the trial of a cause **and serving a copy of the notice upon all parties**, and **if a party has not already been served with a summons and complaint, the plaintiff shall also serve a copy of the complaint on that party** . . . . (emphasis added).

Strict compliance with Tenn. R. Civ. P. 41.01 is required.[5] *Frye*, 70 S.W.3d at 714-15; *Faulks v. Crowder*, 99 S.W.3d 116, 127 (Tenn. Ct. App. 2002). In *Frye*, the Tennessee Supreme Court found that the plaintiff's failure to serve copies of the voluntary dismissal and original complaint on the defendants at the time of the dismissal rendered the saving statute unavailable to save plaintiff's second complaint from being time-barred:

> If the plaintiff is to have the benefit of the one-year tolling period of the saving statute, Tennessee Code Annotated section 28-1-105(a) requires first that the plaintiff must have 'commenced [the action] within the time limited by a rule or statute of limitation.' Thus, availability of the saving statute is dependent upon a plaintiff's compliance with Rule 3. . . . We read Rule 41.01's requirement of service of a copy of the Notice of Voluntary Dismissal and complaint to satisfy Rule 3's ultimate goal of having process served on the defendant. Although this is not technically process because a summons it not served on the defendant at this time, the service of a copy of the Notice of Voluntary Dismissal and the complaint are appropriate in this situation, and provide (1) notice of the action and the filing of the complaint and (2) notice that the plaintiff may commence a new action under the Tennessee saving statute within one year of the nonsuit.

70 S.W.3d at 716.

The defendants argue, and the trial court found, that Plaintiff did not strictly comply with Rule 41.01.

## II. SERVICE REQUIRED BY RULE 41.01

The undisputed facts and the parties' positions make it clear that the first question to be addressed is whether Rule 41.01's requirement that a nonsuiting plaintiff "serve" the notice of dismissal and the dismissed complaint on defendants who have not previously been served with the summons and complaint must be interpreted to refer to "service" under Tenn. R. Civ. P. 4 or "service" under Tenn. R. Civ. P. 5.

Defendants Morris and Madison assert that Plaintiff never served them with the order of voluntary dismissal or original complaint because, in this situation, "service" must be obtained pursuant to Tenn. R. Civ. P. 4. Consequently, they assert, Plaintiff's counsel's service, attempted under Rule 5, does not meet the requirement of strict compliance with Tenn. R. Civ. P. 41.01.

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[5]It is clear that both a copy of the original complaint and the notice of nonsuit must be served. The Advisory Commission Comment to the 1991 Amendment states:

> Rule 41.01(1) is amended to require service of both the written notice of nonsuit and a copy of the complaint on other parties. Such a requirement helps cure the injustice of a plaintiff filing a complaint and summons under Rule 3 and immediately taking a nonsuit. If the saving statute applies, the plaintiff would get the benefit of tolling a statute of limitations without the defendant knowing of any litigation.

Plaintiff does not maintain that he attempted to serve defendants under Rule 4,[6] since that rule applies to service of process and no process was issued at the dismissal. He further asserts that he complied with Rule 5 and that service under that rule was accomplished.

The trial court agreed with the defendants' position and held that, in order for the saving statute to provide protection against dismissal of the second complaint on statute of limitations grounds, service of the notice of dismissal and the original complaint must be accomplished pursuant to Rule 4. The trial court concluded that "when the *Frye* court used the word "service" it meant what it said and that service is a term of art set forth explicitly in T.R.C.P. 4.04." The trial court held that "'service' must be effectuated consistent with T.R.C.P. 4. This could be done by personal delivery (Rule 4.04(1)) or even registered mail pursuant to Rule 4.04(10) but it must be accomplished pursuant to Rule 4." We respectfully disagree.

The Rules of Civil Procedure use the terms "serve" and "service" to describe delivery of pleadings, orders, and other documents that are produced throughout the course of litigation. *See*, *e.g.*, Tenn. R. Civ. P. 5.01; Tenn. R. Civ. P. 12.01; Tenn. R. Civ. P. 27.01(2); Tenn. R. Civ. P. 30.02; Tenn. R. Civ. P. 33.01; and Tenn. R. Civ. P. 56.04. The use of either word does not automatically implicate the procedural requirements set out in Tenn. R. Civ. P. 4; to the contrary, "serve" generally refers to the less strict requirements in Tenn. R. Civ. P. 5.

While Rule 4 includes some specific steps to be taken to effectuate service, the rule itself, and therefore the service referred to therein, deals with "Process." Process, or leading process, is the document, usually a summons,[7] that brings the defendant before the court, asserts the court's jurisdiction over the case, and requires the defendant to respond. *See* Advisory Commission Comments to Rule 4. "Process" is generally defined as "the means of compelling the defendant in an action to appear in court . . . , or a means whereby a court compels compliance with its demands." BLACK'S LAW DICTIONARY 1370 (rev. 4th ed. 1968).

Consequently, those provision of Tenn. R. Civ. P. 4 that deal with service apply only to service, or delivery, of the leading process, the summons (along with copies of the complaint).[8] "The primary function of [Fed R. Civ. P.] Rule 4 is to provide a mechanism for bringing notice of the commencement of any action to the defendant's attention and to provide a ritual that marks the

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[6]Plaintiff did not attempt personal service on the defendants pursuant to Tenn. R. Civ. P. 4 and does not assert that his mailing of the documents complies with the requirements for service of process by mail in Tenn. R. Civ. P. 4.03(2).

[7]The court clerk issues process by (1) signing and dating the summons and (2) placing documents to be served in the hands of the appropriate person for service upon the opposing party. *See* Tenn. Code Ann. § 18-1-101 and Tenn. R. Civ. P. § 4.01.

[8]"The service of writs, summons, rules, etc. signifies the delivering or leaving them with the party to whom or with whom they ought to be delivered or left; and, when they are so delivered, they are then said to have been served." BLACK'S LAW DICTIONARY 1534 (rev. 4th ed. 1968).

court's assertion of jurisdiction over the lawsuit." 4 C. WRIGHT, A. MILLER, FEDERAL PRACTICE AND PROCEDURE 3d § 1063.

Tenn. R. Civ. P. 41.04 requires that specific documents be served on defendants. A summons is not one of the documents included. That rule does not require that a nonsuiting plaintiff have a summons or leading process issued on the complaint he or she has just dismissed. *See Frye*, 70 S.W.3d at 716 ("[T]his is not technically service because a summons is not served on the defendant at this time"). Indeed, as the Supreme Court noted in *Frye*, such a requirement would be "illogical." *Id*. at 714 n5. Consequently, there is no process to be served, and the provisions of Tenn. R. Civ. P. 4 relating to service of process do not apply.

The language of Tenn. R. Civ. P. 41.04 leads to the same conclusion. That rule requires "serving" a copy of the notice of dismissal on all parties. In addition, it requires the plaintiff to also "serve" a copy of the complaint on any party who has not already been served with a summons and complaint. The requirements differ only in what documents must be provided to the defendants, not in how that delivery or service must be effectuated. Thus, service under Rule 5 is all that is required in both situations. Additionally, the rule does not specifically state that the requirements for service of process in Rule 4 apply, as is clearly stated in other rules. *See*, *e.g.* Tenn. R. Civ. P. 5.01.[9] As the Supreme Court stated, delivery of the notice of dismissal and the original complaint is intended to provide the defendants with notice of the original action and its dismissal and notice that the plaintiff may commence another action within one year; the purpose is not to require the defendant to appear and answer the dismissed complaint. The Rules of Civil Procedure do not require that notices be served like process; they serve different functions.

In contrast to service of process as set out in Rule 4, Rule 5 deals with the filing and service of papers in a lawsuit other than the summons or process.[10] *See* Advisory Commission Comments to Tenn. R. Civ. P. 4. It specifically includes "every order required by its terms to be served; . . .

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[9]In *Eyman v. Kentucky Central Insurance Co.*, 870 S.W.2d 530 (Tenn. Ct. App. 1994), a case relied upon by the trial court, this court interpreted Tenn. Code Ann. § 56-7-1206(a) which provided that a party intending to rely on uninsured motorist coverage "shall, if any action is instituted against the owner and operator of an uninsured motor vehicle, serve a copy of the **process** upon the insurance company issuing the policy in the manner presented by law, as though such insurance company were a party defendant." (emphasis added). The court determined that the statute required serving process and the requirements of Tenn. R. Civ. P. 4 regarding service of process applied. Tenn. R. Civ. P. 41.04 has no such language regarding process, and the case is therefore distinguishable.

[10]Tenn. R. Civ. P. 5. provides in part:

> 5.01. Unless the Court otherwise orders, every order required by its terms to be served; every pleading subsequent to the original complaint; every paper relating to discovery required to be served on a party; every amendment; every written motion other than one which may be heard *ex parte*; and, every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar papers shall be served upon each of the parties, but no service need be made on parties adjudged in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons, or for constructive service, in Rules 4, 4A, or 4B.

every written notice . . . and similar papers."[11] Tenn. R. Civ. P. 5.01; *see also* Advisory Commission Comments to Tenn. R. Civ. P. 5. Section 5.02 specifies how such "service" is to be accomplished.

We conclude that Tenn. R. Civ. P. 41.01 requires that a nonsuiting plaintiff, at the time of the nonsuit, serve a copy of the notice of dismissal and a copy of the dismissed complaint on any defendant who has not been previously served with a summons and complaint and that such service must comply with the requirements of Tenn. R. Civ. P. 5, not with the requirements for service of process under Tenn. R. Civ. P. 4.

## III. COMPLIANCE WITH SERVICE UNDER RULE 5

Having determined that service must be accomplished only in compliance with the requirements of Rule 5, we must now determine whether Plaintiff has met those requirements. More accurately, we must determine whether the defendants Morris and Madison have shown they are entitled to judgment as a matter of law based upon the filings in the record before us on the basis Plaintiff failed to comply with Tenn. R. Civ. P. 41.01 when he dismissed the first lawsuit.

Defendants Morris and Madison did not argue in their summary judgment filings that Plaintiff did not comply with Tenn. R. Civ. P. 5. Instead, their argument was that compliance with Tenn. R. Civ. P. 41.01 required service as described in Tenn. R. Civ. P. 4. On appeal, these defendants again primarily argue that "'Service' must be effectuated in accordance with Rule 4." However, they also argue that even if service were allowed by unregistered mail, there is no contemporaneous record of mailing as required by Rule 5.03.[12]

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[11]Defendants Madison and Morris argued in the trial court and in this court that Rule 5 applies only to pleadings subsequent to the complaint. Indeed, among those papers required to be served on other parties by Rule 5 are "every pleading subsequent to the original complaint." Tenn. R. Civ. P. 5.01. Defendants' argument overlooks the fact that, even if the order of voluntary dismissal were a subsequent pleading, the original complaint was filed herein before the order of dismissal. Further, the defendants' reliance on the last clause of Tenn. R. Civ. P. 5.01 is misplaced since the notice or order of dismissal did not assert new or additional claims for relief against them. It merely notified them of the dismissal of claims previously filed. Similarly, the copy of the complaint that had been dismissed was required by Rule 41.01 to provide the defendants with notice of the claims that were being nonsuited. The new complaint, filed three months after the nonsuit, asserted claims for relief, and it was served, along with a summons, pursuant to Rule 4.

[12]This argument reflects certain observations made by the trial court about the proof regarding Plaintiff's compliance with Tenn. R. Civ. P. 5.02, even though the court rested its grant of summary judgment to the defendants primarily on its conclusion that service must be accomplished in accordance with Tenn. R. Civ. P. 4. Specifically, the trial noted:

> (1) The affidavit of counsel that upon 'the best of my knowledge, information and belief' he complied with Rule 41.02 is not an affirmation upon which the Court can place much confidence. This statement 'upon the best of my knowledge, information, and belief' is suspect and of little value.
> (2) Even if service were allowed by unregistered mail, there is not a certificate on the complaint as required by T.R.C.P. 5.03.
> (3) There is no contemporaneous record of the mailing as required by T.R.C.P. 5.03.

Tenn. R. Civ. P. 5.02. provides:

> Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering to him or her a copy of the document to be served, or by mailing it to such person's last known address, or if no address is known, by leaving the copy with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at such person's office with a clerk or other person in charge thereof; or, if there is none in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

Thus, according to Tenn. R. Civ. P. 5.02, service may be accomplished by mailing a copy of the document to be served to the last known address of the party to be served. In the trial court defendants Morris and Madison stated as undisputed facts that Plaintiff had mailed the order of dismissal and the original complaint to "the address where I thought the defendants were doing business at the time," quoting from the affidavit of Plaintiff's counsel. That address is reflected in other filings. These defendants have not alleged that the address used was incorrect or was not the last known address. Nor have they provided any evidence to contradict the accuracy of the addresses.

Tenn. R. Civ. P. 5.03 provides:

> Whenever any pleading or paper is served under 5.01 and 5.02, proof of the time and manner of such service shall be filed before action is taken thereon by the court or the parties. Proof may be by certificate of a member of the Bar of the Court or by affidavit of the person who served the papers, or by any other proof satisfactory to the court.

As the trial court found, the Order of Voluntary Dismissal of the original complaint contained a certificate of service. That certificate did not state that the original complaint was included, but counsel's later affidavit did. Plaintiff's counsel submitted two affidavits in opposition to the defendants' motion for summary judgment. The second affidavit is quoted earlier, and the first, dated October 2002, stated in pertinent part:

> On September 30, 1999, within one year of filing the original Summons and Complaint, I caused the case to be voluntarily dismissed. To the best of my knowledge, information and belief I followed all of the requirements of Rule 41 T.R.C.P. Specifically, a copy of the notice, order and complaint were sent to the defendants through the U.S. mail, postage prepaid at the address where I thought the defendants were doing business at the time.

The certificate of service is a contemporaneous record that the Order of Voluntary Dismissal was mailed to defendants Morris and Madison. As noted earlier, these defendants do not appear to have disputed the address. Therefore, we must interpret their assertion that "there is no contemporaneous record of mailing" as referring to the dismissed original complaint. Because the complaint was dismissed months after it was filed, it is unlikely that the complaint itself would contain a certificate of service stating it was mailed to the defendants after it was dismissed. Therefore, the logical place to find a reference to the mailing of the dismissed original complaint would be in the certificate of service on the order of voluntary dismissal or a cover letter, had one existed.

The trial court was troubled that there was no contemporaneous record showing that the original complaint was served along with the order of voluntary dismissal. The court was not persuaded by counsel's affidavit filed three years after the mailing at issue[13] and based on "information and belief." While prudence and good practice dictate that a certificate of service accurately reflect all documents delivered, Tenn. R. Civ. P. 5.03 allows proof of service by evidence other than the certificate of service. The affidavit of counsel provided herein is such evidence; counsel stated he mailed the complaint. Rule 5.03 gives the trial court some discretion to determine whether the "other proof" is "satisfactory to the court." Despite the trial court's misgivings as to whether Plaintiff proved compliance with Tenn. R. Civ. P. 41.01, it cannot be disputed that the certificate of service and affidavits of counsel did not disprove such compliance. That is the critical point at this stage of the litigation.

The first task of a trial court or this court, in deciding a summary judgment motion filed by a defendant, is to determine whether the moving party has presented proof that negates an essential element of the plaintiff's claim or establishes an affirmative defense. *Blair v. West Town Mall*, 130 S.W.3d 761, (Tenn. 2004); *McCarley v. West Quality Food Service*, 960 S.W.2d 585, 587-88 (Tenn. 1998).

> To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail.

*Staples v. CBL Associates, Inc.*, 15 S.W.3d 83, 88-89 (Tenn. 2000) (citations omitted).

Defendants Morris and Madison based their summary judgment motion on the affirmative defense of statute of limitations. Thus, it was their burden to show that Plaintiff had failed to comply with the requirements of Tenn. R. Civ. P. 41.01 so that the saving statute did not apply.

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[13]We note that the sufficiency of service under Tenn. R. App. P. 5 was not raised by the defendants until just before the affidavit in question was submitted.

The defendants did not allege, much less present evidence in the form of affidavits or otherwise, that they never received the order of voluntary dismissal and the dismissed original complaint. Instead, they made arguments about Plaintiff's technical compliance with Rule 41.01: (1) service must be accomplished under Rule 4, and (2) there was no contemporaneous record of service by mail of the dismissed complaint. By failing to show the documents were not received, the defendants did not meet their burden; they did not even raise the question of whether, in fact, service by mail of both documents was accomplished.

Whether or not the burden to come forward with additional proof ever shifted to Plaintiff, defendants Morris and Madison did not present any proof to dispute the certificate of service and affidavits of counsel. Consequently, any deficiencies in the certificate of service cannot be the basis for the grant of summary judgment to those defendants. As *Blair*, *Staples*, and *McCarley* make clear, a defendant moving for summary judgment cannot rely solely on omissions in the plaintiff's proof.

The certificate of service required by Tenn. R. Civ. P. 5.03 is *prima facie* evidence that the document was served in the manner described in the certificate and raises a rebuttal presumption that it was received by the person to whom it was sent. *Vanleer v. Harakas*, No. M200100687COAR3CV, 2002 WL 32332191, at * 8 (Tenn. Ct. App. Dec. 5, 2002) (no Tenn. R. App. P. 11 application filed); *Orr v. Orr*, No. 01-A01-9012-CH-00464, 1991 WL 226916, at *4 (Tenn. Ct. App. Nov. 6, 1991) (no Tenn. R. App. P. 11 application filed). While the details set out in Rule 5.02 "are designed to give every reasonable assurance that a copy of the pertinent papers in the suit actually reach adversary parties . . . ," Advisory Commission Comments to Tenn. R. Civ. P. 5, there obviously exists the possibility of proof that a document was not received even though a certificate of service appears on it. *See Masters v. Rishton*, 863 S.W.2d 702, 705 (Tenn. Ct. App. 1992) (finding that although an order included a certificate of service, it was in fact never served). However, the burden is on the complaining party to show that he was not served.

Here, the certificate of service only states that a copy of the order of voluntary dismissal was served on the defendants. That certificate remains unrebutted. As to whether the dismissed original complaint was included with the order, the defendants have simply never offered any evidence that it was not. Whether or not the affidavit of Plaintiff's counsel could overcome proof to the contrary had it been offered, at this point the affidavit also remains unrebutted.

We reverse the trial court's grant of summary judgment to defendants Morris and Madison.

## IV. Dismissal Of Defendant Grubbs

The trial court granted defendant Grubbs's motion to dismiss because the statute of limitations had expired. While the general ground for the dismissal of defendant Grubbs was the same as that for defendants Morris and Madison, it was based on different underlying facts and law and was accomplished by a separate order.

A Tenn. R. Civ. P. 12.02(6) motion admits the truth of all the relevant and material factual allegations in the complaint but asserts that no cause of action arises from these facts. *Davis v. The Tennessean,* 83 S.W.3d 125, 127 (Tenn. Ct. App. 2001). In reviewing the trial court's grant of the motion to dismiss, we must presume that the factual allegations in the complaint are true, and review *de novo* the trial court's legal conclusion that Plaintiff failed to state a claim for relief. *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999); *Stein v. Davidson Hotel* Co., 945 S.W.2d 714, 716 (Tenn. 1997). In the case before us, the only facts relate to the procedural posture of the case, which we will briefly review.

The accident that is the subject of the lawsuit occurred April 26, 1998. Defendant Grubbs was added as a defendant by an amended complaint filed March 18, 2002, almost four years after any cause of action against him based on the accident could have arisen.

As set out earlier, Plaintiff filed a complaint against defendants Morris and Madison on February, 1999, within the statute of limitations. Mr. Grubbs was not named in that complaint. Defendants Morris and Madison did not file answers to the complaint since they were not served with process, so the original defendants did not have the opportunity to allege comparative fault as a defense to the original complaint before it was voluntarily dismissed by Plaintiff.

Plaintiff then filed a second lawsuit on December 16, 1999, making the identical allegations and claims as in the first complaint. Only Defendants Morris and Madison were named as defendants; Mr. Grubbs was not mentioned. Defendants Morris and Madison answered on February 9, 2000, and denied various allegations and claims as well as asserted several affirmative defenses. They did not allege that Mr. Grubbs or any other person not a party caused or contributed to the injury alleged by Plaintiff.

The litigation proceeded and was eventually set for trial. One month before trial, on December 26, 2001, two years after the complaint was filed and more than three and a half years after the accident, defendants Morris and Madison filed a motion to amend their answer. The proposed amended answer added an allegation that "third parties who are not a party to this suit, caused or contributed to the injury or damage for which the Plaintiff seeks recovery." That third party was identified as Major Grubbs, employed at all relevant times by Liquid Transport Corp.[14]

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[14]The amended answer alleged that on the date of the accident, Major Grubbs, driving his employer's vehicle,

> stopped his truck blocking one or both southbound lanes on Old Hickory Boulevard and motioned to Defendant Brian Morris to exit the private drive in front of him. At this time the Plaintiff passed the truck being driven by Grubbs by moving out of the southbound lanes on Old Hickory Boulevard and into the turning lane, where he struck the vehicle driven by Defendant Brian Morris. . . . Grubbs was negligent when he directed the Defendant Morris to pull out when he (Grubbs) knew, or in the exercise of reasonable care, should have known that an accident would or might occur from cars passing his (Grubbs') tanker truck.

Plaintiff opposed the defendants' motion to amend their answer. He pointed out that the practical effect of granting the motion would be to add another defendant to the lawsuit and that the existence of the other driver named in the proposed amendment had been known since the time of the accident, April of 1998, because he was listed as a witness on the accident report generated by the police.

Apparently the motion to amend their answer filed by defendants Morris and Madison was heard on January 18, 2002. On March 6, 2002, counsel for the defendants sent a copy of a Consent Order allowing amendment, pursuant to Tenn. Code Ann. § 20-1-119, to counsel for Plaintiff. That Order was signed by the judge on March 14 and entered, but Plaintiff's counsel did not sign it. An amended Consent Order was entered March 22, 2002, allowing defendants to amend their answer and allowing Plaintiff to amend his complaint to add as defendant Major Grubbs and his employer. An amended complaint was filed March 18, 2002.[15]

Mr. Grubbs filed a motion to dismiss, pursuant to Tenn. R. Civ. P. 12, on the basis he could not be added as a defendant since the complaint was not filed within the applicable statute of limitations and Tenn. Code Ann. § 20-1-119, allowing extension of the statute of limitations in certain circumstances where a defendant alleges that the fault of a third party caused or contributed to the injuries complained of, did not apply unless the original complaint was filed within the statute of limitations.

After the defendants figured out that the complaint had been filed after a nonsuit of the previous complaint against defendants Morris and Madison, Mr. Grubbs clarified the basis for his motion to dismiss. He argued that Tenn. Code Ann. § 20-1-119 did not extend the statute of limitations applicable to him for the four years since the accident because he had not been named in the complaint in the original non-suited action or in any defendant's answer in that action.

The amendments to both the original answer filed by defendants Morris and Madison and to the original complaint were based on Tenn. Code Ann. § 20-1-119, which provides in relevant part:

> a) In civil actions where comparative fault is or becomes an issue, if a defendant named in an original complaint initiating a suit filed within the applicable statute of limitations, or named in an amended complaint filed within the applicable statute of limitations, alleges in an answer or amended answer to the original or amended complaint that a person not a party to the suit caused or contributed to the injury or

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[15]The amended complaint alleged that defendants Morris and Madison had raised as an affirmative defense the negligence of Major Grubbs and that:

> Plaintiff would show that Defendant, Major Grubbs was the driver of a vehicle, a tanker truck which was on the roadway near the scene of the accident. Further, Plaintiff alleges that the Defendant, Major Grubbs is liable for the injuries sustained by Plaintiff resulting from this accident due to his negligence in the operation of his vehicle.

> damage for which the plaintiff seeks recovery, and if the plaintiff's cause or causes of action against such person would be barred by any applicable statute of limitations but for the operation of this section, the plaintiff may, within ninety (90) days of the filing of the first answer or first amended answer alleging such person's fault, either:
>
> (1) amend the Complaint to add such person as a defendant pursuant to Rule 15 of the Tennessee Rules of Civil Procedure and cause process to be issued for that person; or
>
> (2) institute a separate action against that person by filing a Summons and Complaint. If the Plaintiff elects to proceed under this section by filing a separate action, the Complaint so filed shall not be considered an "original Complaint initiating the suit" or "an Amended Complaint" for purposes of this subsection. (emphasis added).

Defendant Grubbs argued and the trial court agreed that because he had not been sued within the original statute of limitations period, nor named in an answer to the original complaint as required by Tenn. Code. Ann. § 20-1-119(a), the statute of limitations had run. Defendant Grubbs argued and the trial court held that the term "original complaint" in Tenn. Code Ann. § 20-1-119(a) excluded a complaint filed in a second action following a nonsuit.[16]

Regardless of the proper interpretation of "original complaint" or other terms in subsection (a), the extension of the statute of limitations available in the circumstances set out in subsection (a) is simply not available to a plaintiff in a second action filed after a nonsuit pursuant to the saving statute. Tenn. Code Ann. § 20-1-119(d) provides:

> The provisions of subsections (a) and (b) shall not apply to any civil action commenced pursuant to § 28-1-105, except an action originally commenced in general sessions court and subsequently recommenced in circuit or chancery court.

There is no dispute that the action herein was filed after a voluntary dismissal of the earlier action in reliance on or "pursuant to" the saving statute, Tenn. Code Ann. § 28-1-105. Therefore, the one year statute of limitations was not extended by the operation of Tenn. Code Ann. § 20-1-119. Mr. Grubbs was sued well after the expiration of the one year statute of limitations. Consequently, he was entitled to dismissal on the basis that the applicable statute of limitations barred the claim against him.[17] We affirm the trial court's grant of Mr. Grubbs's motion to dismiss.

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[16]We note that the only distinction made in Tenn. Code Ann. § 20-1-119(a) is between the pleadings as originally filed (original complaint and original answer) and those pleadings after amendment (amended complaint and amended answer).

[17]Because no party has raised it in the trial court or before this court, we do not reach the issue of the grant to defendants Morris and Madison of their motion to amend their answer.

## CONCLUSION

The judgment of the trial court is affirmed in part and reversed in part. The case is remanded for further proceedings. The costs of this appeal are taxed equally to the appellant, Douglas C. Boone, and the appellees, Brian Morris and Madison Armored Car, L.L.C.

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PATRICIA J. COTTRELL, JUDGE